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Falling off Balance: How the Tenth Circuit's Stance on the Implementation of a Balancing Test Undermines Congressional Intent in Regard to Extending Sovereign Immunity to Economic Entities of a Tribe

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FALLING OFF BALANCE: HOW THE TENTH CIRCUIT'S STANCE ON THE IMPLEMENTATION OF A BALANCING TEST UNDERMINES CONGRESSIONAL INTENT IN REGARD TO EXTENDING SOVEREIGN IMMUNITY TO ECONOMIC ENTITIES OF A TRIBE

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I. Introduction

According to the 2010 United States Census, 28.4% of all Native Americans lived in poverty—a figure that overshadows the national poverty rate of 15.3%.[1] These statistics demonstrate a continued need to allow Native American businesses to grow, which would in turn allow the tribes to channel money back to their tribal members. One concept in particular that has spurred on tribal business growth is the doctrine of sovereign immunity.

The recent influx in Native American tribal corporations, most notably casinos, has allowed some tribes to see a correspondingly significant amount of capital flowing back to the tribe.[2] Economic development and self-sufficiency are some of the exact reasons Congress has acknowledged and supported the concept of sovereign immunity for Native American tribes, which allows tribes to operate and conduct business on tribal land with minimal government interference.[3] The freedom from traditional restrictions on certain commercial activity provided by sovereign immunity has certainly allowed some tribal economies to flourish. Further, because tribal entities are not subject to suit in traditional areas of employment

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1. Press Release, U.S. Census Bureau, Facts for Features: American Indian and Alaska Native Heritage Month: November 2011 (Nov. 1, 2011), *available at* http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff22.html.

2. *See 2003-2012 Gross Gaming Revenue Trends*, NAT'L INDIAN GAMING COMMISSION, http://www.nigc.gov/Portals/0/NIGC%20Uploads/media/teleconference/2012%20Gross%20Gaming%20Revenue%20Trends.pdf (last visited Dec. 23, 2013). The National Indian Gaming Commission reported total revenues for 2012 to be $27.9 billion. *Id.*

3. In a recent holding, the Supreme Court upheld sovereign immunity, stating "absent such an abrogation (or a waiver), Indian tribes have immunity even when a suit arises from off-reservation commercial activity." Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2028 (2014).

litigation[4], they have extensive freedom in hiring and employing tribal members. Thus, sovereign immunity has played an integral role in many tribes' abilities to act self-sufficiently and support members financially. However, recently federal courts are declining to extend tribal sovereign immunity to tribal economic enterprises by holding that tribal enterprises are not an arm of the government. This has severely undermined the doctrine of tribal sovereign immunity, and subverts congressional intent of supporting tribal self-determination and self-sufficiency.

This note discusses the recent Tenth Circuit case *Somerlott v. Cherokee Nation Distributors, Inc.*, in which the court further diminished the breadth of tribal sovereign immunity by refusing to follow a prescribed balancing test, and failing to extend sovereign immunity to an economic sub-entity of the Cherokee Nation. Although the potentially harming language was articulated in dicta, this note examines the effect such a proposal could have if courts decide to follow this dicta. Failing to extend sovereign immunity to economic sub-entities of a tribe simply because the entity was not formed under tribal law potentially opens the court's doors to a flood of litigation against tribes. In turn, this would cause a great financial burden for many tribes, and prevent them from attaining self-sufficiency and providing financial support to their tribal members.

This note is organized into four parts: first, it discusses the history of the doctrine of sovereign immunity coupled with an analysis of the policy reasons for the doctrine. Second, it examines sovereign immunity as it relates to economic sub-entities, including the different tests and factors courts have used in deciding how far to extend sovereign immunity. Third, it analyzes the *Somerlott* case in detail, including the portion of the dicta suggesting that the current balancing test should be struck down, and the reasons why balancing tests have generally been favored. Lastly, this note examines what effect the court's dicta will have on important policy considerations, including harm to the state treasury by disincentivizing tribes from forming business entities under state law. The Tenth Circuit should not adopt the court's suggestion to eliminate the current balancing test when determining if a sub-entity is protected under tribal sovereign immunity, because doing so would directly conflict with congressional intent to promote the economic well-being of tribes.

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4. Title VII specifically declares that term "employer" does not include "the United States, a corporation wholly owned by the government of the United States, Indian Tribe, or any department or agency of the District of Columbia." *See* 42 U.S.C. § 2000e(b) (2012).

II. Background

A. The Cherokee Nation

The Cherokee Nation (the Nation) is a federally recognized Native American Indian Tribe.[5] The Nation has over 284,000 citizens,[6] and over 8000 employees in various industries—making it one of the largest employers in northeastern Oklahoma.[7] Originally generating the majority of its revenue from gaming operations, the Nation has since expanded into other areas of economic development. Today, the Nation has competitive business ventures in several different fields, including: environmental and construction services, health-care services, manufacturing, hospitality, industrial businesses, real-estate, safety and security businesses, and information technology.[8] The Nation contributes more than $1.5 billion annually to Oklahoma and surrounding economies.[9] The Nation continues to emphasize its sovereignty and independence through its economic activities and community development: "The Cherokee Nation is committed to protecting our inherent sovereignty, preserving and promoting Cherokee culture, language and values, and improving the quality of life for the next seven generations of Cherokee citizens."[10] Sovereign immunity has played a key role in cultivating the Nation's past, and likely, future growth.

Although the Cherokee Nation has enjoyed great economic success, the same is not true for many tribes across the country. Despite its recent economic success, the Cherokee Nation continues to experience high rates of poverty among its people. According to a recent report, 26.3% of

5. *Federal and State Recognized Tribes*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx (last visited Oct. 3, 2014).

6. *About the Nation*, CHEROKEE NATION, http://www.cherokee.org/abouttheNation.aspx (last visited Oct. 3, 2014). The Cherokee Nation reported the second largest population of any Native American tribe, behind only the Navajo Nation. Tina Norris et al., U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010*, U.S. CENSUS BRIEFS, Jan. 2012, at 1, 17 tbl. 7, *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf (last visited Oct. 3, 2014).

7. *About the Nation*, *supra* note 6.

8. Mark Fogarty, *The Growing Economic Might of Indian Country*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 15, 2013), http://indiancountrytodaymedianetwork.com/2013/03/15/growing-economic-might-indian-country-148196. The report further notes the economic success of several other Indian nations across the country. *Id.*

9. *About the Nation*, *supra* note 6.

10. *Id*.

residents in Cherokee Country in Oklahoma live in poverty.[11] Even successful Native American tribes like the Cherokee Nation still contain alarmingly high rates of sickness, demonstrating why the maximum amount of support should be granted to continue to see the economic recovery of their people.[12] Further, tribes that suffer economically and do not generate enough revenue to be self-sustaining remain heavily dependent on the federal government for support. For example, the Yurok Tribe in California was forced to suspend food distribution programs to its members during the federal government shutdown in October 2013 because it had no alternate means of funding the program.[13] Although tribes have the ability to utilize sovereign immunity in order to further tribal interests, tribes such as the Yurok show that it is not always possible to do so. While some tribes have reaped the benefits of utilizing tribal sovereign immunity for economic growth, the poor conditions of Native American people across the country serve as a consistent reminder that tribes must continue to seek financial prosperity so they can protect and support their people. Consequently, the diminution of sovereign immunity is likely to harm and disadvantage many tribes that have yet to fully realize its benefits. Further, the poor conditions of the people of all tribes show a continued need to extend the doctrine to all tribal economic enterprises.

B. Guiding Principles of Law

1. Indian Tribes

United States courts have long held that "'Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government.'"[14] As distinct and independent sovereign powers, tribal immunity exempts Indian tribes from suit by non-Indian

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11. *Health Status Profile for: Cherokee County, Oklahoma,* OK.GOV, http://www.ok.gov/health/pub/boh/state00/profiles/Cherokee.pdf (last visited Oct. 10, 2014).

12. U.S. DEP'T OF HEALTH & HUMAN SERVS., DIABETES IN AMERICAN INDIANS AND ALASKA NATIVES: FACTS AT A GLANCE (June 2012), *available at* http://www.ihs.gov/MedicalPrograms/Diabetes/HomeDocs/Resources/FactSheets/2012/Fact_sheet_AIAN_508c.pdf. This fact sheet distributed by the Indian Health Services shows just how effected Native American people are by diabetes. *Id.* The report shows that Native Americans are 2.3 times more likely to be diagnosed with diabetes. *Id.*

13. Jonathan Kaminsky, *Indian Tribes Struggle, and Fume, as U.S. Shutdown Wears On*, REUTERS (Oct. 12, 2013, 7:13AM), http://www.reuters.com/article/2013/10/12/us-usa-fiscal-tribes-idUSBRE99B03T20131012.

14. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

parties absent an explicit waiver by the tribe or congressional abrogation.[15] For example, if a non-Indian party enters into a contract with a tribe, and the tribe does not specifically waive sovereign immunity, then the non-Indian party may not bring suit against the tribe.[16] Sovereign immunity protects the tribe and its assets. The policy behind sovereign immunity developed over years of statutes and case law.[17] As summarized by the Eighth Circuit, the important policy considerations underlying the doctrine of tribal sovereign immunity are "necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy."[18]

As described above, certain tribes, such as the Cherokee Nation, have prospered greatly by utilizing the doctrine of sovereign immunity. The Cherokee Nation serves as a terrific example of fulfilling the congressional intent behind upholding tribal sovereign immunity. The Nation creates a vast number of jobs in Oklahoma,[19] and utilizes its profits to grant scholarships to its tribal members, as well as supporting a myriad of other tribal programs benefiting its citizens.[20] Although sovereign immunity is not the sole reason for the Nation's success, it has provided an advantage for both the Cherokee Nation and other tribes when conducting business by shielding tribes from the increasingly expensive costs of litigation for certain claims.[21] The additional money a tribe retains can then be infused back into the tribe in the areas of education and health, among others.

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15. Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 523 U.S. 751, 755, (1998).

16. *See id.*

17. *See* William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1623-24 (2013) (showing that the doctrine of tribal sovereign immunity was largely correlative with that of other foreign nation's same sovereign immunity rights, in part because the original Native American nations had ongoing relations with European countries before settlement of America).

18. Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985).

19. *Major Employers in Oklahoma (500 Employers or More), 1999*, OK.GOV, http://www.state.ok.us/osfdocs/budget/table1.pdf (last visited Oct. 10, 2014); *see also Cherokee Nation First Native American Tribe to Endow Scholarship at Oklahoma State University*, OKSTATE.EDU (May 3, 2011), https://news.okstate.edu/articles/cherokee-nation-first-native-american-tribe-endow-scholarship-oklahoma-state-university.

20. *Cherokee Nation: College Resources*, CHEROKEE.ORG, http://www.cherokee.org/Services/Education/CollegeResources.aspx (last visited Oct. 10, 2014).

21. Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies (n.d.), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf (statement presented at the 2010 Conference on Civil Litigation, Duke Law School). A report of "major

2. Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort

Until recently, the question of the extent of a Tribe's sovereign immunity for its sub-entities was a constant point of litigation, with no clear test delineated by the federal circuit courts. In *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort* (*Breakthrough Management*) the court was faced with the specific question of whether an economic entity created by a tribe may enjoy the same sovereign immunity that the tribe does.

Breakthrough Management Group (BMG) is a Colorado corporation that provided business management and consulting services.[22] BMG sold its training materials for individual and group use.[23] Chuckchansi Gold Casino—a tribally created entity who operates independently of the Tribe, but works for the financial benefit of it—purchased a single-person license from BMG to use its training program.[24] BMG claimed that the Casino violated the terms of the license by recording the material and using it to train large groups of employees without properly receiving permission from BMG.[25] BMG sued, alleging violations of federal copyright infringement, trademark infringement, and violation of the Racketeer Influenced Corrupt Organizations Act.[26]

In addressing the parties' claims, the court was forced to determine whether the Casino was protected under the Tribe's sovereign immunity, which would preclude the Casino from suit.[27] The Tribe filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, citing the doctrine of sovereign immunity.[28] The district court denied the Tribe's motion to dismiss, holding that tribal sovereign immunity did not extend to the Casino because the Tribe was not financially liable for the legal obligations incurred by the Casino.[29] In

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companies" showed that "[a]s of 2008, the average respondent reported nearly $115 million total annual litigation costs (which exclude awards and settlements), having risen from $66 million in 2000." *Id.* at 7.

22. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1176-77 (10th Cir. 2010).

23. *Id.*

24. *Id.* at 1177.

25. *Id.*

26. *Id.*

27. *Id.* at 1178.

28. *Id.*

29. *Id.* at 1179.

deciding the case, the district court noted the "Authority" that ran and operated the casino was comprised of a board containing identical members to the governing Council of the Tribe. Despite having identical board members, the district court determined that the casino was a non-Indian entity and was therefore not entitled to the protection of sovereign immunity; it found the Tribe was insulated from any financial harm caused by the Casino because no direct financial liability would result.[30] Specifically, the court noted that "the Tribe's right to receive profits would not be threatened by a judgment, only the amount of profits would be adversely affected."[31]

On appeal, the Tenth Circuit recognized that its decision would implicate three important concepts: (1) tribal sovereignty, (2) tribal sovereign immunity, and (3) tribal economic development.[32] The court noted that because tribes are independent political communities, the concept of "immunity [] is thought [to be] necessary to promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy."[33] The court continued its analysis by stating that tribal sovereign immunity is not limited to the tribe itself, but rather may be extended to subdivisions and economic sub-entities of a tribe.[34] In reaching its decision, the court referenced previous sovereign immunity cases that based their decisions in part on promoting the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[35] Finding that the district court's treatment of the financial relationship between the tribe and its economic entities as a dispositive issue was in error, the Tenth Circuit established several factors to consider when determining whether extending sovereign immunity to tribal entities is proper.[36]

In what is now a widely adopted test, the Tenth Circuit court articulated six factors to consider when determining whether an economic entity of a tribe qualifies as a subordinate economic entity, thus entitling it to

30. *Id.*

31. *Id.*

32. *Id.* at 1182.

33. *Id.* (quoting Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985)).

34. *Id.* at 1183.

35. *Id.* at 1182 (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

36. *Id.* at 1187.

sovereign immunity.[37] The six factors, which were applied as a balancing test, include:

1) the method of creation of the economic entity;

2) the purpose of the entity;

3) the entity's structure, ownership, and management, including the amount of control the tribe has over the entity;

4) the tribe's intent to extend its sovereign immunity to cover the entity;

5) the financial relationship between the tribe and the entity; and

6) the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies—such as protection of tribe's monies, preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians—are served by granting immunity to the economic entity.[38]

In establishing these factors, the court considered several different tests used by federal and state courts, and concluded that these six factors were the most helpful in making an appropriate determination.[39]

In its application of the six-factor balancing test, the *Breakthrough Management* court held that the Casino was entitled to enjoy the Tribe's sovereign immunity because the two entities were very closely related, further stating that, "[t]he Authority and the Casino plainly promote and fund the Tribe's self-determination through revenue generation and the funding of diversified economic development."[40] Throughout the process of evaluating the merits for and against each factor of the test, the court specifically noted whether each factor *weighed* for or against the conclusion that the entity was entitled to sovereign immunity. It found all factors should be considered, and no one factor was dispositive. Overall, the court

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1195.

concluded that five out of the six factors, including the method of creation, the purpose of the entity, whether the tribe intended it to maintain sovereign immunity, the financial relationship between the tribe and the casino, and whether the purposes of sovereign immunity are served by granting it immunity, weighed in favor of extending sovereign immunity to the casino.[41] While the court did not say precisely how many of the factors must be present in order for sovereign immunity to extend to an economic entity, the court's choice of language demonstrates that the five factors were a clear case for such an extension of immunity. In particular, the court noted that, because the Authority, the Casino, and the Tribe were so closely related, the Casino fell under the Tribe's sovereign immunity.[42] Accordingly, subsequent courts following the *Breakthrough Management* six-factor analysis look at the totality of the circumstances in every case. In addition, the BMG court took particular precautions not to impede on the economic well-being of the tribe, possibly demonstrating that this factor weighs heavier than any of the other factors.

C. Courts' Subsequent Application of the BMG Test

The United States District Court in South Dakota recently applied the *Breakthrough Management* test in *J.L. Ward Associates Inc. v. Great Plains Tribal Chairmen's Health Board*.[43] The court in *J.L. Ward* recognized that there is not a uniform test to determine how far sovereign immunity extends; however, there is increasing case law following the precedent set forth in *Breakthrough Management*.[44] The court stated that while Great Plains, a non-profit corporation, was formed under South Dakota law, the factors as established in BMG weighed heavily in favor of granting sovereign immunity.[45]

The court's specific use of the word "weighed" shows its intent to use the factors as a balancing test, and to consider the totality of the circumstances rather than make an individual threshold determination. This intent is evidenced by the court's decision to continue its analysis beyond simply determining that Great Plains was an entity formed under South

41. *Id.* at 1191-95.

42. *Id.* at 1195.

43. J.L. Ward Assocs. Inc. v. Great Plains Tribal Chairmen's Health Bd., 842 F. Supp. 2d 1163, 1176 (D.S.D. 2012).

44. *Id.* (showing that many courts are choosing to follow a multi-factor test utilizing very similar factors).

45. *Id.*

Dakota law.[46] Of the remaining factors considered by the court, the entity's economic contribution to the tribe, the fifth factor in *Breakthrough Management*, carried substantial weight in the balancing test. The court noted, "[b]y engaging in these activities, Great Plains promotes the preservation of tribal cultural autonomy and tribal self-determination, two of the federal policies behind tribal sovereign immunity."[47] Taking these factors into consideration, the court held Great Plains was entitled to enjoy the Tribe's sovereign immunity from suit.

In another case from the California Court of Appeals, the state court used the *Breakthrough Management* factors to determine whether an economic entity of the Sycuan Tribe was protected by tribal sovereign immunity.[48] After reviewing the facts and applying the six-factor balancing test, the court held that "the dispositive fact throughout our analysis is that U.S. Grant, LLC is a California limited liability company."[49] The court stated the entity's "status as a California Limited Liability Company weighs heavily in favor of finding it subject to the jurisdiction of California courts, regardless of its relationship to the Sycuan Tribe."[50] While the court's language on its face may appear to undermine the balancing test articulated in BMG, the important fact to note is that the court continued the analysis as a balancing test, rather than immediately ending its analysis upon finding that U.S. Grant, LLC was formed under state law. For example, the court concluded that the second factor did not weigh in favor of granting sovereign immunity because the company was formed for the specific purpose of participating in a for-profit business.[51] The court next found that the ownership of the company was not closely tied to the Indian tribe, nor was there any clear intent for the company to carry the tribe's sovereign immunity.[52] The court went on to conclude that the balance of factors "weighs heavily against sovereign immunity for US Grant LLC."[53] The court explained that the most significant factor in the analysis was the fact that the company was formed under California law rather than tribal law. However, the court held that whether a business is formed under state law is

46. *Id.*
47. *Id.* at 1177.
48. Am. Prop. Mgmt. Corp. v. Superior Court, 206 Cal. App. 4th 491, 501 (Cal. Ct. App. 2012).
49. *Id.*
50. *Id.* at 503.
51. *Id.* at 504.
52. *Id.* at 505.
53. *Id.* at 508.

a *factor* in the determination, rather than a per se rule that prohibits the extension of sovereign immunity.[54]

Upon review of several cases applying the *Breakthrough Management* test, it is clear that lower courts have effectively applied the test as originally intended: a balancing of factors. Although forming an entity under state law may appear counterintuitive to upholding tribal sovereign immunity, it is still entirely possible that a tribal entity formed under state law is protected by tribal sovereign immunity.

III. Somerlott v. Cherokee Nation Distributors, Inc.

A. Facts

The Tenth Circuit decided the *Breakthrough Management* case approximately ten days before the plaintiffs in *Somerlott* served their opening brief.[55] The holding in *Breakthrough Management* was a victory favoring the protection of tribal entities, and the defense in *Somerlott* relied heavily on the legal reasoning used by the Tenth Circuit to discern when it is appropriate to extend sovereign immunity to economic entities of tribes.

Tina Marie Somerlott worked at the Reynolds Army Community Hospital in Fort Sill, Oklahoma as a chiropractic technician until the time of her termination in January 2007.[56] Her former employer, Cherokee Nation Distributors (CND), was a limited liability corporation (LLC) formed under Oklahoma state law, and a wholly owned and operated subsidiary of Cherokee Nation Businesses, Inc. (CNB).[57] CNB, in turn, is an entity formed under Cherokee Tribal law that enjoys full sovereign immunity from traditional suit.[58] CND was formed under state law as an Oklahoma LLC because at the time of its formation, the Cherokee Nation did not have a law providing for the formation of LLCs. [59]

In April 2008, Somerlott brought an employment discrimination suit in court against CND for violations of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act.[60] CND filed a motion to dismiss based upon the doctrine of tribal sovereign immunity; it claimed that it was

54. *Id.* at 502.

55. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010).

56. Somerlott v. Cherokee Nation Distribs., Inc., 686 F.3d 1144, 1146 (10th Cir. 2012).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1147.

exempt from suit under Title VII and the ADEA.[61] Somerlott opposed the dismissal, and argued that the Tribe's relationship to CND was too attenuated for it to benefit from the Tribe's exemption.[62] In support of her argument, Somerlott asserted that the chiropractic clinic served non-Indian clients, evidencing that it did not further a government interest.[63]

In deciding the motion to dismiss, the district court had to determine whether CND could be classified as a "subordinate economic entity" of the Cherokee Nation, which would allow it protection under the Tribe's sovereign immunity.[64] From the beginning of its analysis, the court noted that while many courts had adopted an analysis to determine whether a tribe's economic entity qualified for sovereign immunity protection, there was little agreement on a standard test.[65] The district court held that, regardless of which test it adopted, "most, if not all" of the criteria considered in making this determination weighed in favor of labeling CND as a "subordinate economic entity" of the Cherokee Nation.[66] In particular, the court noted that the purpose of CNB was to take "control of tribally-owned entities, like CND, that were originally created under state law. This allowed the Cherokee Nation to essentially re-incorporate these entities under tribal law, as most were created before tribal law addressed the incorporation of business entities."[67]

Somerlott appealed the district court's decision to the Tenth Circuit, raising three principal issues: First, she argued that the lower court erred in extending tribal sovereign immunity to CND because it lacked sufficient connection with the tribe, and CND's activities were too far attenuated to be a governmental activity of the tribe.[68] Second, she argued that the court improperly held CND was exempt from the ADEA.[69] Lastly, she argued that the court's judgment was in error because it ruled before CND responded to plaintiff's discovery.[70]

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. Somerlott v. Cherokee Nation Distribs. Inc., No. CIV-08-429-D, 2010 WL 1541574, at *11 (W.D. Okla. Apr. 16, 2010).
68. *Somerlott*, 686 F.3d at 1147.
69. *Id.*
70. *Id.*

B. The Tenth Circuit's Decision

Upon review, the Tenth Circuit held that Somerlott did not properly preserve the issue regarding tribal sovereign immunity on appeal, therefore preventing the court from reviewing the decision.[71] In making its ruling, the Tenth Circuit cited a previous decision holding that "[a]n issue is preserved for appeal if a party alerts the district court to the issue and seeks a ruling."[72] In her brief to the district court, Somerlott directed the majority of her arguments to the issue of statutory and non-statutory exemptions that tribes have from Title VII[73] and the ADEA—a separate and distinct issue from upholding sovereign immunity to economic entities.[74] The court noted that Somerlott herself conceded that the subordinate economic entity test was the correct test to apply in the given situation.[75]

Despite its ruling on procedural grounds, the court continued to discuss the application of the *Breakthrough Management* test to the CND.[76] The court focused its discussion on the fact that CND was incorporated under state law.[77] The court said that by organizing under state law, the entities are "voluntarily subjecting[ing] themselves to the authority of another sovereign which allows them to be sued."[78] The court reasoned that if tribal sovereign immunity applied in this situation, then the extent of the tribe's immunity would exceed that of the United States'.[79] Citing a Second Circuit case from the early twentieth century, the court stated "[w]hen the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation."[80] Had the issue of extending a tribe's sovereign immunity to economic entities been properly preserved, the court concluded CND, an Oklahoma LLC, would not have been entitled to the Tribe's sovereign immunity, and would have been subject to both the ADEA and Title VII regulations.[81]

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71. *Id.* at 1150.

72. *Id.* (quoting Ecclesiastes 9:10–11–12, Inc. v. LMC Holding Co., 497 F.3d 1135, 1141 (10th Cir. 2007)).

73. An example of a statutory exemption tribes hold can be found in section 703(i) of Title VII of the Civil Rights Act of 1964, which allows Indian employers to discriminate in favor of hiring Indian employees over non-Indian ones. *See* 42 U.S.C. § 2000e-2(i) (2012).

74. *Somerlott*, 686 F.3d at 1150.

75. *Id.*

76. *Id.* at 1149.

77. *Id.*

78. *Id.* at 1149-50.

79. *Id.* at 1150.

80. *Id.* (quoting Salas v. United States, 234 F. 842, 844-45 (2d Cir. 1916)).

81. *Id.*

IV. Analysis—Implications of Somerlott

A. Somerlott *Is Inconsistent with Prior Case Law*

As previously discussed, many courts had begun to use the *Breakthrough Management* factors in making sovereign immunity determinations for tribal economic entities. The *Somerlott* dicta is clearly inconsistent with the Tenth Circuit's own holding in *Breakthrough Management*. Further, because many courts in different circuits already apply the *Breakthrough Management* test somewhat frequently, it is likely that other circuit courts may soon adopt the *Breakthrough Management* multi-factor test as law in their respective circuits—creating a clear circuit split.

The Tenth Circuit Court based its holding in *Somerlott* entirely on the fact that CND was formed under state law rather than tribal law—a holding that is completely contrary to what the Court established previously in *Breakthrough Management*. The court explained this departure from a prior decision by way of analogizing tribal sovereign immunity to the United States' sovereign immunity. Although the court correctly quoted a previous case explaining that "[t]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States,"[82] the policy reasons underlying the respective doctrines of sovereign immunity for tribes and the United States are vastly different. While the Constitutional basis and underlying policy for federal sovereign immunity[83] may generally be unclear, the United States Supreme Court explicitly stated the purpose behind continuing sovereign immunity for federally recognized Indian tribes in the Kiowa Tribes case: "[w]e retained the [tribal sovereign immunity] doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency."[84] Thus, not only is the Tenth Circuit undermining its own case law in *Breakthrough Management*, they are further undermining a strong federal policy to protect the economic well being of tribes supported by Congress and adopted by the Supreme Court. While it is unclear whether extending sovereign immunity to the tribes in this instance is more extensive than federal sovereign immunity, it is clear that removing tribal protection will have tangible, harsh effects on all Native American tribes.

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82. *See* Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1011 (10th Cir. 2007).

83. *See* United States v. Lee, 106 U.S. 196, 205 (1882).

84. Kiowa Tribes v. Mfg. Techs., 523 U.S. 751, 757 (1998).

As previously mentioned, courts in other circuits have adopted the factors established in *Breakthrough Management*.[85] It is thus likely that many courts will continue to view the factors as a complete balancing test, without any one factor being a determinative factor. As circuit courts generally do not like to intentionally create splits, the suggestion in *Somerlott* is likely to create this undesired result.

B. The Somerlott *Holding Undermines a Balancing Test Approach to This Issue*

In *Breakthrough Management*, the Tenth Circuit recognized that a balancing test was the best means to analyze whether tribal economic sub-entities were shielded by tribal sovereign immunity.[86] Through their subsequent dicta in *Somerlott*, the Tenth Circuit seemingly undermines its own 'totality of the circumstances' approach, and attempts to establish a threshold determination instead of a true balancing test. By abandoning a balancing test, the Tenth Circuit disregards the clear advantages promoted by a balancing test, most notably the valuable use of judicial discretion.

Although the pertinent language is in dicta, it is clear the Tenth Circuit's intention in *Somerlott* is to undermine the previously established balancing test. The court's decision to discuss the issue of sovereign immunity despite the issue's mootness on procedural grounds shows that it is opposed to extending the *Breakthrough Management* test to tribal economic entities formed under state law. The court creates a determinative factor that must be met before any of the other factors can be considered at all. By creating this all or nothing approach to the extension of tribal sovereign immunity based on how a tribal business is formed, the Tenth Circuit is creating a bright-line rule which is not favored in general corporate law, and other areas that contain competing interests between the state and the opposing party.

In its decision, the Tenth Circuit inappropriately relied on one individual factor to determine whether sovereign immunity would extend to a sub-entity: the law under which the corporation was formed.[87] In contrast, the court in *Breakthrough Management* concluded that "the following factors are helpful" in making this determination, but are not conclusive.[88] In

85. *See* Am. Prop. Mgmt. Corp. v. Superior Court, 206 Cal. App. 4th 491, 500 (Cal. Ct. App. 2012).

86. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187-88 (10th Cir. 2010).

87. Somerlott v. Cherokee Nation Distribs., 686 F.3d 1144, 1149-50 (10th Cir. 2012).

88. *Breakthrough Mgmt. Grp.,* 629 F.3d at 1187.

Breakthrough Management, the court established the factors which should be looked at as a whole, and held that not any one factor served as a threshold requirement to determining whether sovereign immunity extended to a tribal business.[89] By only considering the first factor in this test, the *Somerlott* court undermined established case law. If the Tenth Circuit continues to issue opinions consistent with this holding, then it will encourage courts to arbitrarily select factors they deem to be decisive, rather than approaching the subordinate economic entity test as a balancing approach as it was designed to be. Further, before the Tenth Circuit continues to require tribal corporations to be formed under tribal law in order to retain sovereign immunity, it should consider the economic effects such a decision would have on tribes, states, and the federal government. By clearly incentivizing tribes to form strictly under tribal law in order to retain sovereign immunity, individual states across the country are likely to lose large sums of money in incorporation fees and taxes that tribal corporations would otherwise be paying the state.

Per se rules are generally disfavored in a variety of subjects matters, because they result in an "overly mechanical application"[90] of the law, and because "the per se rule is a 'demanding' standard that should be applied only in clear cut cases."[91] Accordingly, it is apparent that per se rules should only be applied in areas of law where there is a clear rule of law, not subject to further interpretation of the courts.

By adopting a per se rule, the court eliminates the valuable use of judicial discretion. One of the most important reasons courts adopt balancing tests is to allow for broad judicial interpretation of issues that tend to be overly complicated. By adhering to a balancing test, courts take the responsibility to look at each case, and its particular circumstances, individually. Although judicial discretion is still required in some circumstances, it is likely that it would be eliminated in a large amount of cases where tribes still do not have laws permitting the formation of LLCs.[92] Thus, there will likely be situations where the federal policy behind

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89. *Id.*

90. Colonel J. Jeremiah Mahoney & Captain Christopher C. VanNetta, *Jurisprudential Myopia: Polygraphs in the Courtroom*, 43 A.F.L. REV. 95, 141 (1997).

91. Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003).

92. 18 WHITE EARTH BAND OF OJIBWE: CORP. CODE ch. 10 (n.d.) ("Formation"), *available at* http://www.whiteearth.com/data/upfiles/files/corporate_code.pdf. The White Earth Nation, a Nation modern enough to have their tribal code listed on Westlaw, still does not have laws permitting the formation of a limited liability company). *Id.*

sovereign immunity—protecting the economic well being of tribes—will be undermined simply because an entity was formed under state law.

Typically, courts adopt balancing tests when there are competing interests at stake, and the balancing test serves as a means to compare or contrast both of the viewpoints. For example, in the landmark U.S. Supreme Court case *Roe v. Wade*, the court utilized a balancing test to weigh the competing interests and viewpoints on women's rights regarding their reproductive health. Although this is a vastly different area of law, the policy rationale behind the Court's holding recognizes two important competing interests, and tailors the balancing test to best protect all interests at stake.[93] Regardless of the situation or area of law, a balancing test is necessary when a simple bright line rule cannot create a fair and equitable result.

Similarly, in the area of tribal sovereign immunity for economic sub-entities, it is appropriate for a judge to balance the concurrent interests at stake and decide whether the tribe or the state has a greater interest. The tribes have a clear interest in promoting the economic well being of their tribe and tribal members, and maintaining sovereign immunity is one way to protect tribal assets. Conversely, an individual has an interest in maintaining suit against a tribe when he or she has been injured. Because there are compelling arguments on both sides as to why sovereign immunity should or should not be granted, it is very important to allow flexibility in the law. A balancing test, as established by *Breakthrough Management*, is specifically designed to provide flexibility through the use of judicial discretion.

Because there are competing interests at stake, a balancing test in the present situation is most desirable. Accordingly, a proper balancing test should look to determine which of these two competing interests carries more weight. At the time CND was formed, the Cherokee Nation did not have its own Tribal law permitting the formation of LLCs. By adopting this proposed bright line rule that would automatically exclude such tribal entities from sovereign immunity, the court creates case law that unfairly prejudices tribes with underdeveloped laws. For example, the Navajo Nation, another very advanced tribe, has a tribal code with twenty-six titles ranging from parks and monuments to commercial trade and corporations.[94] On the contrary, the White Earth Nation's tribal code contains nineteen

93. Roe v. Wade, 410 U.S. 113, 165 (1973).

94. NAVAJO NATION CODE ANN. tit. 5, § 3600 (2009) (the Navajo Nation's LLC Act); NAVAJO NATION CODE ANN. tit. 19, § 1 (2009) (the Nation's title concerning parks and monuments).

chapters, and does not contain laws permitting the formation of a tribal LLC.[95] Thus, a fair result can only truly be reached by retaining the flexibility of the full balancing test—one that takes into account the legal and business realities on a case-by-case basis.

If courts decide that in order to utilize tribal sovereign immunity, the entity must be formed under tribal law, then additional factors should be utilized when the tribe does not have laws that allow the formation of a particular business entity. An interesting analogy to consider is the relationship between Cherokee business law and Oklahoma business law, and that between Oklahoma law and Delaware law. Under Delaware law, an individual may choose to register their business as one of eight different business entities.[96] Due to the advanced corporate laws that exist in Delaware, many states across the country imitate Delaware's laws, including Oklahoma. Thus, there is generally a lag between Oklahoma state corporate law and Delaware corporate law.[97] The same holds true for tribal law as well, and as many authors are quick to point out, tribal law is often lagging behind state and federal law.[98] Consequently, it would burden tribes to require them to frequently update their corporate law codes, especially when many states themselves are not even up to date on the most recent corporate law trends.

Currently, LLCs are a very popular business choice due to the limited extent of liability for shareholders. As such, both the state of Oklahoma and the Cherokee Nation developed their own law that allowed for formation of LLCs. However, many smaller tribal nations have yet to develop these laws that allow for formation of LLCs, consequently causing any tribal entity to lose sovereign immunity for forming under state LLC laws. Because LLCs are a rather modern trend in business formation,[99] it is probable that new

95. 18 WHITE EARTH BAND OF OJIBWE: CORP. CODE ch. 10.

96. *Legal Business Structures Table*, STATE OF DELAWARE: DIV. OF REVENUE, http://revenue.delaware.gov/services/Business_Tax/business_structures_table.pdf (last visited Aug. 30, 2014).

97. *See* Mohsen Manesh, *Delaware and the Market for LLC Law*: *A Theory of Contractibility and Legal Indeterminacy,* 52 B.C. L. REV. 189, 200-01 (2011) ("The first LLC statute was adopted in 1977, and Delaware did not adopt its first LLC statute until 1992. But even in this short time, Delaware seems to have emerged as the national leader in the competition to attract LLC charters.").

98. Pat Sekaguaptewa, *Tribal Courts and Alternative Dispute Resolution*, ABA BUS. L. SEC. (Nov./Dec. 2008), http://apps.americanbar.org/buslaw/blt/2008-11-12/sekaquaptewa.shtml.

99. Michael Goldman & Eileen Filliben, *Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century*, 25 DEL. J. CORP. L. 683, 707 (2000)

popular business formations will soon be available. The court's holding would unfairly penalize tribes that do not keep up to date with the most advanced corporate laws—something that many states struggle to do. Accordingly, it would be wise for the court to add an additional factor in the balancing test when the tribe does not have the option to form a business under tribal law, or at the minimum, create an exception so that sovereign immunity is not automatically withheld from less economically-developed tribes with businesses incorporated under state law.

C. State's Loss on Tribal Entities' Incorporation and Other Fees

The Tenth Circuit may also want to consider the implications the *Somerlott* holding will have on state treasuries. Every year there are thousands of newly-incorporated business entities in every state,[100] each of which pays an incorporation fee to the state.[101] Although the economic impact may not be relevant in states that have little to no Native American tribal presence, in states like Oklahoma, New Mexico, and California, the loss of incorporation fees from countless newly forming tribal business entities could quickly add up to make a staggering difference in state revenue.

The State of Delaware had 103,271 new LLCs form in 2012, an increase of over 10,000 LLCs formed in 2011.[102] This shows a clear trend favoring the use of LLCs. As the economy continues to recover from the 2008 recession, it is very likely this number likely grow in the years to come. In 2012 the state of Delaware reported general fund revenue collections from businesses at $867.2 million, a dollar amount that accounted for 26% of the state's total general funding.[103] Although Delaware is the state with the largest amount of incorporated organizations, it still serves as an example of the potential downfall for state treasuries that may result from incentivizing tribes to form under their own tribal law rather than state law. States that have a heavy tribal presence, like Oklahoma, would possibly see large

("Perhaps the most prominent example of the trend toward private ordering is the increasing popularity of the LLC.").

100. Jeffrey W. Bullock, *Delaware Division of Corporations: 2012 Annual Report*, STATE OF DELAWARE: DIV. OF CORPS., http://corp.delaware.gov/pdfs/2012CorpAR.pdf (last visited Aug. 30, 2014). Delaware, which serves as the model business formation state, shows that there is a general shift favoring the limited liability company. *Id.* In total, Delaware saw 145,182 new businesses formed. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

losses on the state treasury if courts create precedent compelling tribes to refrain from incorporating businesses under state laws.

VI. Conclusion

Upon review of the implications of the Tenth Circuit's dicta in *Somerlott*, it is readily apparent that the negative effects such a recommendation will have on tribes are contrary to congressional intent. Congress has been clear that the purpose of the doctrine of tribal sovereign immunity is to "promote the federal policies of tribal self-determination, economic development, and cultural autonomy."[104] Although some tribal entities may not serve these purposes, a balancing test is necessary to give a fair determination of whether a particular business entity should be entitled to sovereign immunity. By adopting a per se rule requiring that a business be formed under tribal law, the court creates unfair precedence prejudicial against less economically-advanced tribes. A balancing test is desirable so that it can do exactly what a balancing test is supposed to do: compare and contrast the competing interests at stake, and give each scenario its own fair and equitable consideration. By oversimplifying the reasons for granting sovereign immunity, courts are placing Native American people across the country in danger of losing much needed support in the areas of medicine, education, and employment. Sovereign immunity is a necessary doctrine that must be protected in order to further the federal policies previously established by the courts.

104. *In re* Whitaker, 474 B.R. 687, 696–97 (B.A.P. 8th Cir. 2012).